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Supreme Court of the United States,

OCTOBER 10, 1905.

No. 21

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,

vs.

JOHN C. GATTI,
Respondent.

BRIEF FOR APPELLANT.

D. CADY HERRICK,
CHARLES E. MILLER,
WILLIAM C. TRULL,
Of Counsel for Appellant.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

To be argued by
D. CADY HERRICK.

Supreme Court of the United States.

THE NEW YORK FOUNDLING HOSPITAL,
Appellant,

vs.

JOHN C. GATTI,
Respondent.

Brief for
Appellant.

No. 258.
Oct. 10, 1905.

Statement of Facts.

This is an appeal from an order of the Supreme Court of the Territory of Arizona, dismissing a writ of Habeas Corpus, obtained by the appellant for the purpose of securing the custody and control of one William Norton, an infant of the age of two and one-half (2½) years, and remanding the said William Norton to the custody and control of the respondent. (Page 40.)

The appellant is a corporation duly incorporated under the laws of the State of New York (pages 32-37), and is authorized by its act of incorporation to receive, keep and take into its care, charge, custody and management, children, who are abandoned, or children born out of wedlock, who by consent of the mother may be intrusted to such corporation.

Laws of New York, 1872, Chap. 635, Record p. 12, fols. 27-28.

The material portions of the Act of 1872 (*supra*) are as follows:

SECTION 1.—The Foundling Asylum of the Sisters of Charity of the City of New York, a corporation created, organized and acting under and by virtue of the laws of this State, are hereby authorized and empowered to receive and keep and take under its care, charge, custody and management, the following children or persons:

1. Children of the age of two years or under, found in the City of New York, abandoned or deserted, as hereinafter mentioned and specified.

2. Children of the like age, whose father or mother is dead and whose surviving parent is for any cause unable to maintain them, and who, by consent in writing of such surviving parent, may be entrusted to such corporation.

3. Children of like age, born out of wedlock, who, by the consent of the mother, may be entrusted to the said corporation; which class shall also include children, whether born in wedlock or not, left in the crib or other receptacle of the said corporation for foundlings.

4. Children of like age, having no parent living, and who, by consent in writing of their guardian, or nearest relative of full age, may be entrusted to said corporation.

5. Children of like age, who may be transferred and entrusted to said corporation by the commissioners of public charities and correction of the City and County of New York.

6. The said corporation may also, with a view to health and nourishment of the child and reformation of the mother, receive temporarily the mother of any such child, born out of wedlock, committed or entrusted as aforesaid, and discharge her; provided always, that such mother shall not be received or detained except on her own request, and by and during her free will and consent.

SEC. 2.—Children entrusted to said corporation by the voluntary act of their parents, guardian or nearest relatives, as hereinbefore provided, shall be deemed to be in the lawful charge and custody of said corporation. Such entrusting shall be made and evidenced by an instrument in writing in form substantially as follows, viz.:

SEC. 11.—Whenever any child, properly chargeable upon the fund placed by law at the disposal of the commissioners of emigration, shall agreeably to the provisions of this act, be entrusted to and supported and maintained by the said corporation, the said corporation shall be entitled to receive from the fund the sum of sixty, seventy-five, or one hundred dollars per annum (according to the age of such children respectively), and proportionally for any portion of a year for every such child; provided, however, that in no case shall the sum so to be received exceed the lowest cost of the support and government of a child of a like age in any of the public institutions at present under the care of the commissioners of public charities and correction of said City and County of New York.

SEC. 12.—In each and every year, after this act shall take effect, the board of supervisors of the City and County of New York shall levy and collect by tax, at the same time and in the same manner as the contingent charges and expenses of the

City and County are levied and collected, and pay over to the said corporation such a sum per week, for every infant under eighteen months of age, as the commissioners of charities and corrections shall certify to have been expended during the last previous fiscal year in the care and provision for the infants per week each, in the infants' hospital, which is under the control of the said commissioners; and for every child over the age of eighteen months, such a sum per year in monthly payments, as the said commissioners shall certify to have been expended as an average cost for maintenance and hospital care of each child for a full year at the institution known as the nursery for children, on Randall's Island, in the last previous fiscal year, as shown and reported by the said commissioners. (fols. 27-29, 33-35.)

It will be observed that by Sections 11 and 12 (*supra*) authorizing the appellant to receive and keep under its care and control such children, provision is made for compensation for such services out of the public funds provided by the State of New York. It is further provided by statute that any child which the appellant has under its care and custody, it may, by the general laws of the state, place out for adoption.

Laws of New York, 1884, Chap. 438, Secs. 5, 7.

The sections read as follows:

"SEC. 5.—Any corporation specified in the first section of this act may bind out any indigent or pauper child, if a male, for a period which shall not be beyond his twenty-first year, and if a female, for a period which shall not be beyond her eighteenth year, which shall have been absolutely surrendered to the care and custody of such corporation in pursuance of the provisions of the first section of this act, or which shall have been placed

therein as a pauper in pursuance of the provisions of the second section of this act, or which shall have been left to the care of such corporation with no provision by the parent, relative or legal guardian of such child, for its support for a period of one year then next preceding, to be a clerk, apprentice or servant, by an indenture in writing, which shall be executed under seal and signed in the name of such corporation by such officer or officers thereof as shall be authorized by the directors or trustees thereof to sign such corporate name to such indentures, and shall be signed also by the person or persons to whom such child shall be so bound out, who shall, in such indenture, undertake to treat such child kindly, which binding shall be as effectual as if such child had bound himself or herself with the consent of his or her father. The provisions of sections eight, nine and ten of article first of title fourth of chapter eight of part second of the Revised Statutes shall apply to all cases of binding under this act."

"SEC. 7.—Any child which a corporation specified in the first section of this act is, by the fifth section of this act, authorized to bind out may be placed by such corporation, by adoption, with some suitable person or persons, by a written instrument of adoption, which shall be executed under seal and signed in the corporate name of such corporation by such officer or officers as shall be authorized by the directors or trustees thereof to sign such corporate name to such instruments, and which shall also be signed by the person or persons with whom such child shall be so placed by adoption, and if either of the persons so taking such child by adoption shall then have a husband or wife from whom such person is not lawfully separated, such instrument of adoption shall also be signed by such husband or wife. When practicable, all such chil-

dren shall be indentured, bound out and given for adoption to persons of the same religious faith as the parents of such children." In June 1891, by the order of the Supreme Court of the State of New York, the name of the appellant was changed from the Foundling Asylum of the Sisters of Charity in the City of New York to The New York Foundling Hospital. (Fol. 78-80.)

William Norton is a child who was born out of wedlock and surrendered by the mother to the custody of the appellant (page 68, fol. 144).

The Supreme Court of Arizona found in substance the following facts (pages 225-30):

For many years past it has been the practice of the petitioner to place infants of suitable age in homes within and without the State of New York, to be cared for, reared, supported, and educated in such homes by the persons to whom they were given, and it so places some four hundred and fifty children each year. The hospital authorities retain the right to visit such homes, and to maintain a supervision over such children until they become of age, but the nature or extent of such supervision, and the method by which it is exercised do not appear from the evidence.

In September, 1904, the authorities of the hospital, upon the written request of a priest who was in charge of a parish including the towns of Clifton and Morenci, in Graham County, Arizona, sent forty children, including the infant William Norton, from its hospital to Clifton, to be placed for adoption in the homes of parishioners of the priest. It was represented that they would be placed for that purpose in the homes of reputable, English speaking Spanish people, who had no children of their own, and who desired children of fair complexion. Children of fair complexion were sent, all of them being of the Caucasian race, about evenly divided as to sex and ranging from eighteen months

to five years of age. Attached to the clothing of each child was a tag giving the age and name of the child, and the name of the person to whom it was consigned.

To each person to whom a child was assigned was sent a letter, signed by the sister superior, requesting that the consignee, within a week after the reception of the child, fill out a blank which was enclosed, containing the name of the child, the name of the foster parents in full, the business occupation and the post office address of such foster parents, and forward the same to the hospital authorities. The letter also requested that the person to whom each child was assigned should write yearly, about the first of May, how the child was progressing, and give other items of interest.

Upon the arrival of the special car at Clifton, on the evening of October 1, 1904, fifteen of the children who had been consigned to the priest's parishioners at Clifton, were taken from the car to the priest's house, and upon the same evening, in the presence of Sister Anna Michella, who was in charge of the children and the other Sisters of Charity accompanying her, and the Agent Swayne, were delivered by the priest to the persons to whom they were consigned. The remaining children were then taken to Morenci, nine miles from Clifton, and there distributed in the same manner and to the same class of people.

The persons to whom the children were consigned and delivered, both in Clifton and Morenci, were, with one or two exceptions, the lowest class of half-breed Mexican Indians, dark skinned, of low and filthy habits of life, vicious, unacquainted with the English language, and, in several cases, prostitutes and persons of notoriously bad character. Their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs, and many of them had children of their own whom they

were unable to support, and were entirely unfit to have the care, custody, control and education of white Caucasian children. No visit to or examination of the homes of these people was made at any time, either by the agent, Swayne, the Sisters in charge, or any one on behalf of the petitioner.

On October 2d, the day after the distribution of the children at Clifton, the facts became known to the American citizens of the place and much indignation was aroused. A committee of influential citizens, including the deputy sheriff, was appointed to wait on the Sisters of Charity and Agent Swayne, who were then at Morenci, and acquaint them with the character of the persons to whom the children had been delivered in Clifton, and with the intense indignation of the citizens. This committee, with Mr. Mills, the superintendent of the copper company operating at that place and one of the leading citizens of the town, met the agent, Swayne, who assumed to be in authority, and in response to their representations he told the committee that he knew his business and did not propose to be dictated to by the people; that "The children had been placed and would stay placed." These statements of the agent, Swayne, were then communicated to the Clifton people of the committee, by telephone, in response to which a committee of twenty-five reputable white citizens was appointed to collect the children left with the half-breed Mexican Indians at Clifton, and to bring them to the principal hotel of the place. The members of this committee then went to the several Mexican Indians' huts where the children were, and upon their statement to the occupants that they were sent by the American citizens to take the children from their possession, the children in each instance, without protest, were voluntarily given up to the committee and taken to the hotel.

Upon the arrival of the train in Clifton, all the

children were neatly clad, cleanly in appearance, and gave every evidence of careful nursing and proper attention. When the children were obtained from the Mexican Indians, they were in a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of Mexican beans, chilis, water melons, and other food which had been fed them, and in some instances from the effects of beer and whiskey that had been given them to drink. Upon the arrival of the children at the hotel, certain good women of the place took charge of them, nursed them, and secured medical care and attention for them. On the next day the children were distributed among the several respondents in these cases, who have since had them in their care, custody and control.

The agent Swayne, returned to Clifton, with the committee, where his refusal to take the children from the Mexican Indians, upon being informed of their character, and his conduct and bearing had aroused intense indignation among the American citizens. Some threats of a general character were made by certain persons present against him, but no violence was offered him. He protested against the taking of the children from the Mexican Indians by the American residents, and neither by his consent, nor that of the Sisters, were the children either taken from the Mexican Indians with whom they had been placed by the priest and Swayne or placed by the American citizens with the respondents.

In Morenci, the distribution of the remaining children among the half-breeds, Mexican-Indians, aroused the same feeling of indignation among the American people at Clifton. After the return of the agent Swayne to Morenci, Mr. Mills, the superintendent of the copper company operating at that place, with other reputable and prominent citizens, called upon the Sisters and the agent Swayne, and

remonstrated with them against permitting the children to remain with the people to whom they had been distributed. As a result of these remonstrances and a statement by Mr. Mills that the American citizens would not suffer the children to so remain, the priest and the agent Swayne, took the children from the half-breed Mexican-Indians to whom they had been delivered by them and returned with them to New York, with the exception of three, who were delivered by Swayne to the deputy sheriff to be distributed among the American residents in Morenci.

The persons in Morenci and Clifton amongst whom the children had been distributed were severally appointed guardians of such children by the Probate Court of Graham County. The respondent John C. Gatti being appointed guardian of William Norton.

Demand was made by the officials of the appellant upon Gatti to deliver possession of the child to them, which he refused to do.

Other facts will be referred to hereafter.

Habeas corpus proceedings were forthwith instituted in the Supreme Court of the territory of Arizona by the appellant to recover possession of the child. The hearing was held before the full bench of the Supreme Court, witnesses were sworn and evidence taken and an opinion written, in which all the members of the Court concurred; and findings of fact made, the substance of which has been above set forth.

The Court, in substance held, that neither party had a legal right to the custody of the child, but felt that for its own best interests, no change should be made in its custody; that it was best for it to remain, in the language of the Court, "In the changing West, the land of opportunity and hope,"

and it is from that decision that this appeal is taken.

While the Record in this case is only entitled in a single proceeding, there were in fact, many other proceedings and by stipulation it was agreed that all pleadings filed and testimony taken in this cause should be taken, applied to and considered by the Court as filed, taken and applied in each of the other cases. (Record, p. 39.)

Pending the hearing upon the writ there was a motion upon the part of the respondents to quash the same and also a motion to dismiss the writ because of the failure of the appellants to file its Articles of Incorporation (Record, pp. 5-6).

A demurrer and exception to the return to the writ was also interposed by the respondents (Record, p. 17). Each of these motions and the demurrer were overruled.

The assignments of error are to be found at page 55 of the record, and are as follows:

I.

The Supreme Court erred in overruling the demurrer of the petitioner to the return, for the reason that it appeared upon the face of the said return that the petitioner had duly perfected its appeal from the order of the Judge of the Probate Court issuing letters of guardianship to the respondent, and that the said order thereupon by virtue of paragraph 1952 of the Revised Statutes of Arizona became *ipso facto* null and void.

II.

The Supreme Court erred in denying the motion of the petitioner to strike out all that portion of the said return which set forth the issuing of let-

ters of guardianship to the respondent, for the reason stated in assignment No. 1.

III.

The Supreme Court erred in ordering that the writ be dismissed for the reason that it appears by the statement of facts found by the Supreme Court that the respondent obtained the custody of the said child unlawfully and by force, and had no right whatever to the custody of the said child.

IV.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that it appears by the statement of facts found by the Supreme Court that the petitioner was entitled to the custody of the said child.

V.

The Supreme Court erred in ordering that the writ be dismissed, for the reason that under the facts and the law, petitioner was entitled to the custody of the said child.

POINTS.

I.

The order of the Court below is appealable to this Court. By Section 1909, U. S. Revised Statutes, writs of error and appeal are allowed to the Supreme Court of the United States, "upon writs of habeas corpus involving the question of personal freedom."

Gonzales *vs.* Cunningham, 164 U. S. Rep., 612.
Cross *vs.* Burke, 146 U. S. Rep., 82.

The right of appeal under Section 1909 was not taken away by the Act creating the Circuit Court of Appeals.

(26 U. S. Stat. 830, Sec. 15.)

Section 15 provides for the right of appeal from the courts of territories to the Circuit Court of Appeals in cases where the judgments of the Circuit Court of Appeals are made final. And this Court has repeatedly held that it is only in cases where the judgments of the Circuit Court of Appeals are made final that this Court is deprived of the jurisdiction conferred upon it by Section 1909 of the revised statutes above cited.

Shute *v.* Keyser, 149 U. S., 649.
Folsom *v.* United States, 160 U. S., 121.

The cases where appeals may be taken from the Supreme Courts of territories to the Circuit Court

of Appeals, and when the judgments of such Circuit Court of Appeals are final are provided for in 20 U. S. Statutes, 828, Sec. 6, Cl. 1, decisions in the cases of writs of habeas corpus are not included in the classes of cases where the judgments or decisions of the Circuit Court of Appeals are final.

Appeals, then, will lie to the United States Supreme Court from the Supreme Court of the Territory of Arizona "upon writs of habeas corpus involving the question of personal freedom."

(Sec. 1909, U. S. R. S.)

Personal freedom is involved whenever the person is unlawfully detained.

It makes no difference whether the question arises between a person imprisoned upon a charge of crime, where the case is between the person so detained and the State, or whether it arises in the case of parent and child, where the custody of the child is alleged to be unlawfully withheld from the parent. If the child is not in lawful custody, and is unlawfully detained, then its personal freedom is involved.

II.

The State of New York, in its capacity of parens patriae, has an absolute right to the custody of the child.

(A) Examination of the historical development of the law relating to the status of parent and child and guardian and ward shows that the State of New York, in the case at bar, is the source

from which all right to the custody of this child proceeds, and that the State of New York has not only all the rights of a parent, which are described as the natural rights, but, in addition, has the ultimate and absolute right to the custody and control of the infant.

The doctrines which have ripened into the present law relating to this subject originated as a part of the feudal system in England. That system was founded upon the proposition that the king was the *parens patriae*, and that from him proceed all right and authority of a subject to the ownership and control of property and person. Incident to this principle of the feudal system, the first kind of guardianship established by the common law was the guardianship of the feudal lord in chivalry. The theory of this right of guardianship was that to the feudal lord there had been delegated a part of the sovereign right of knight service and that, therefore, if a tenant by knight service died, leaving an heir male under the age of twenty-one years or female under the age of fourteen years, the lord had the custody of the estate in order that he might take the income of the estate as a substitute for the knight service by which the lands under the authority of the sovereign were held. (See Co. Litt., 74 B., Section 103.)

As an incident of this kind of guardianship, there was established the right of the feudal lord to the custody of an infant child, and that right was based upon the principle that he had been delegated by his sovereign a part of the right of control of the subject by the sovereign, which was the fundamental principle upon which the feudal system was based. The relation of guardian and ward being a substitute for the relation of parent and child, it is apparent that both of those relations, and the right of both the parent and the guardian, proceed precisely from the same source;

and it follows that the right of a parent to the custody of a child is in no sense absolute, but is a trust delegated by the sovereign to the parent, and, as such, subject to be regulated by the sovereign or to be determined by the will of the king or the State. In Dwight on the Law of Persons and Personal Property (p. 242), it is said:

> "It was the theory of the English law that the king, as *parens patriae*, had the care of those who are not able to take care of themselves, particularly in cases where it is clear that some protection should be thrown around them. The right of the father, viewed from this standpoint, is not personal, but derived from the State. It is not so much a power as a *trust*. In that aspect, it is expected that he will properly take care of and rear the child with due regard to his education and training in letters, morals and religion."
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> Cary *v.* Bertie, 2 Vernon, 333 at 342;
> Ryre *v.* Shaftsbury, 2 P. Williams, 103 at 119;
> Butler *v.* Freeman, Ambler's R., 301.

It must be conceded that the right of a parent to the custody of a child is superior to the right which is exercised by a guardian. The parent has what is known as the natural right of guardianship, which means that the law of the sovereign State has recognized the propriety of permitting a parent to control his child to the extent of establishing, as a uniform doctrine governing the exercise of the sovereign right, that, in the absence of a controlling reason for depriving the parent of his so-called natural right, he shall take precedence over others in the matter of guardianship. But consideration of the historical development of the law of this subject demonstrates that the king, as the source of power and authority over all his subjects, or the State standing in the

place of the king, over its citizens, has a power to re-take unto itself the delegated right of custody of an infant, and this power is superior, not only to that of a guardian, but to the power of a parent. In other words, the State being the source of all power and right to the custody of its citizens and, in the case at bar, the State of New York having exercised its power and re-taken to itself the custody of the child, the right of the State becomes of a character which includes all of the rights which a natural parent would have to the control of his child, and, in addition, all of the rights which a sovereign power has to the custody of its subject.

(B) The doctrine of comity between States prevented the Supreme Court of Arizona from depriving the State of New York of the custody of the infant child to which, by the laws of New York, it was entitled.

As it appears as a fact in this record that the State of New York was exercising, and attempting to continue, the custody of the person of this infant under its authority as sovereign, and by means of the direct action of its legally constituted agent, it follows that, if the question of the custody of this child were presented in the courts of the State of New York, those courts would have no right, upon any legal theory, to deprive the sovereign State of its control of the child, nor to exercise, as against the State, any discretion whatever in the matter of selecting the guardian of the infant. The situation would be precisely the same as if, at the time when the feudal system was in force in England, a chancellor, acting under, and as the personal representative of, the sovereign, had attempted to exercise his power directly against the will of the sovereign.

It is true that the Supreme Court of Arizona

was possessed of the general jurisdiction to regulate the custody of an infant merely because the infant was within the territory, just as the courts of that territory had the general jurisdiction to exercise, as against any person within its boundaries, the police power for the protection of its citizens and their property. And if the child in question had been brought into the State under the control of a natural parent or in the custody of a guardian, the courts of Arizona, having jurisdiction of the persons by reason of their situation, would have the power and the right to take any action compatible with the laws of the territory for the purpose of regulating the *status* of parent and child or guardian and ward, as justice might require.

Such a situation would be distinguishable from the case at bar in the essential respect that the courts of Arizona would then be dealing with and regulating a particular *status* which had been originated by the laws of another State. If the State of New York, in the exercise of its sovereignty, had merely created a *status* such as would have resulted from the appointment of a parent, or other designated person, to be the guardian of a child, the exercise of sovereignty would have ceased with the establishment of that *status*, leaving it to be regulated and determined by the laws of any State or country where the courts secured jurisdiction of the persons affected. But in the case at bar, the State of New York, in the exercise of its sovereignty, has done more than create the relation of guardian and ward as between its subjects, and has taken back unto itself its sovereign right to control the child. It has then come into the territory of Arizona and attempted there to continue its control of the child. An illustration of this distinction is shown clearly by considering the right of a State when exercised over property rather than

over persons. If the State of New York, by its laws, decrees that personal property shall belong to one of its citizens, the sovereignty of the State is then exercised in creating the *status* and condition of ownership. If the citizen of New York then proceeds into another State and becomes subject to another jurisdiction, that jurisdiction may, by its courts and its laws, regulate and control the ownership of that property. But, if the State of New York secures the ownership of personal property, taking it back to itself from its citizens, and that property should be brought within the jurisdiction of another State or territory, the doctrine of comity between nations would prevent the territory from so exercising its jurisdiction as to deprive the State of New York of the property which belonged to it.

This Court has held in the Bank of Augusta *vs.* Earle, 13 Peters U. S. 519 at 590, that "the intimate union of these states as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as, without doubt, must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this Court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent."

If this is the rule laid down as between the states, how much stronger should it be between the United

States and one of the sovereign states, which compose it. Full faith and credit should be given by the United States to the acts of the several states, unless they are in conflict with the policy of the Federal Government.

The exercise of comity is an exercise of sovereign power, a determination of sovereign policy.

There is no sovereignty in a territory; its authorities can exercise no sovereign power, can determine upon no sovereign policy.

This Court has repeatedly held that the Government of the United States is the sovereign of the territories, and it is for that Government to determine the policy of those territories. And in the absence of any legislation in that behalf, it is for this Court, in proper cases, to determine what that policy shall be, and it is respectfully submitted that this case calls for a determination which will recognize and give full force and effect to the Act of the State of New York in intrusting its wards to the care and custody of this appellant; and permit them to remain where their parent, the State of New York, placed them, and not in the care of those beyond its control, and upon whom it can enforce no responsibility.

(C) *The State of New York, having all of the rights of a natural parent to the control of this child, was entitled to its custody by reason of the finding of the Supreme Court of Arizona that the State of New York was a fit guardian for the child.*

By the findings of fact of the Court below, upon which this Court must make its determination, it appears as a fact that the State of New York, by its agent, the Foundling Asylum, was a fit and proper guardian of the child. It is true it also appears that the persons having the present custody of the child were fit and proper persons. The de-

cision of the Court below awarding the custody of this child to persons other than the appellant, was made upon a record wherein it was determined that, as between two persons, one of whom had all the rights of a parent to the child's custody, and the other being a stranger, both persons being fit, the custody of the child was awarded to the stranger. In Dwight on the Law of Persons and Personal Property, 243, it is said:

> "Still, the court has no power to deprive the father of the custody of the child merely because it for the latter's benefit, nor merely on the ground of his peculiar religious opinions, nor on account of poverty, passionate temper, or harshness in conduct. It is not enough that removal from the father would be better for the children, but it must appear to be essential to their safety and welfare. The jurisdiction is not confined to residents, but extends to citizen parents, though the children may be born and reside abroad."

In Richards *v.* Collins (45 N. J. Eq. 283, at 286), it is said:

> "Doubtless it is the strict legal right of parents and those standing *in loco parentis*, to have the custody of their infant children as against strangers. This right will control the judgment of the Court unless circumstances of weight and importance connected with the welfare of the child exist to overbear such strict legal right."

In the case of *In re* Finn (2 De Gex & S. 457), it is held that, before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court must be satisfied that the father has so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential

to their safety or welfare, that the father's rights should be interfered with.

Again, in Curtis *v.* Curtis (5 Jurist, U. S.), the doctrine of *In re* Finn is approved, and it is held that the Court of Chancery has no jurisdiction to remove a child from the custody of its natural parents merely because it would be for the benefit of the child. Such a removal can be decreed only when "in some very material and important respect it is *essential* to the welfare and well-being of the children, either physically, intellectually or morally, that it should be so."

(See page 1148.)

III.

The facts found by the Court below entitled appellant as a matter of right to the custody of the child.

(A) These facts are briefly as follows: That a child, William Norton, born out of wedlock and abandoned, was, in October, 1902, received and taken under its care, charge, custody and management by The Foundling Hospital, under its charter. The child, having been abandoned, became a ward of the State, which under such circumstances acts as *parens patriae*.

Fondham *vs.* Pierce, 141 Mass., 203.
Ex parte Krauss, 4 Wharton (Pa.), 9.
In re Barry, 42 Fed. Rep., 113, at p. 118.

In re Barry, the Court, at page 118, says:

> "The cases before cited show that the English and American Courts act in this

> behalf solely upon the assertion of the right of the sovereign whose power they administer to continue or change the custody of the child at his discretion as *parens patriae*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him."

The Foundling Hospital, therefore, in all that it did with reference to this child, under its charter, acted as the agent of the State of New York, and as its representative, in carrying out and fulfilling the duties imposed upon the State itself. Whatever interference was had by any one with the Hospital, while carrying out such duties, was an interference with the agents of the State of New York. Without reference to the question as to the legal rights of such agents in another State, it is perfectly clear that very strong reasons must exist to justify the Courts of Arizona in refusing to recognize the right of the State of New York to the possession of its wards.

In Woodworth *vs.* Spring (4 Allen, 321), cited by the Court of Arizona with approval, the Court, speaking of the rights of a guardian of a child, say:

> "But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly States having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicile. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to

> which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the Court to award to the foreign guardian the custody of the person."

An examination of that case shows that the decision was based upon the ground that the claim to the custody of the child was made by a guardian appointed in another State. The Court says:

> "An administrator appointed under the laws of a foreign State cannot act as such in this Commonwealth, nor, for like reasons, can a guardian appointed by virtue of the Statutes of another State execute any authority here over the person or property of his ward. His rights and powers are strictly local and circumscribed by the jurisdiction of the Government which clothed him with the office."
>
> P. 324.

And it recognizes a palpable distinction between that case and that of a foreign parent.

At page 323, the Court says:

> "Even the parental relation, *which is everywhere recognized*, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. The *patria potestas* of a foreign parent over his child is not that which is vested in him by the laws of the place of his domicile, but that which exists by virtue of the parental relation in the country where the father seeks to enforce his authority."

So that, had the application in the Massachusetts case been made by the father of the child, the Court would undoubtedly have granted the application, inasmuch as the parental relation, everywhere recognized, would confer upon a foreign parent the right to the custody of his child under the laws

of Massachusetts, where the father sought to enforce his authority.

It is respectfully submitted that the relation of a State to an abandoned child within its jurisdiction gives it and its agents even a greater right to recognition in a foreign State than in the case of a parent. The power of a parent over a child exists only by virtue of the consent of the State where the child is born, and the State always retains the paramount right of disposing of the custody and care of that child in cases where it considers it for the interests of the child so to do.

The State acts upon the assumption that its authority as *parens patriae* supersedes all authority conferred by birth.

People *v.* Chegary, 18 Wend., 637-42.
People *v.* Mercein, 8 Paige, Ch. 47-69.

But the fatherhood of the State, so to speak of its relation, applies with peculiar force to the case of an abandoned child. That child, having been abandoned by the parent and become a ward of the State, such relation will be recognized wherever the child may be found. That the State in this instance had confided the custody to the Foundling Hospital is immaterial. It must perform its duty towards the child through the instrumentality of some agent, and never loses its legal relation to the child from the fact that it has confided it to any particular person or institution.

Again, the obligation of State comity in a case like this, where the public policy of the State of New York is interfered with and thwarted, is so strong that it would seem that it was the duty of the Court to recognize no reason or excuse for refusing to the State its ward except the consent of the State itself.

It is well settled by the Courts of New York that the managers of the institution are not bound by

State limits in providing for children committed to them under the statutes.

> People vs. Governors, &c., of House of Refuge, 18 How. Prac. Rep., 409.

The Hospital, therefore, when it sent the child to Arizona, was carrying out its duty in a manner recognized by the laws of the State.

IV.

The State of New York having rightfully confided these children to the appellant, the appellant has, irrespective of its agency for the State of New York, a legal right to the custody and control of the children, even when such children are without the State of New York and within a Territory, because of the powers lawfully vested in it as a corporation.

(A) Treated simply as a corporation, and not as an agent, representing and acting for the State of New York, the Courts of Arizona should have recognized the appellant's right to the custody of these children.

In the absence of any law to the contrary, the appellant had a right to exercise its right of custody and control over the children confided to it, in any part of the United States.

While a corporation "Must dwell in the place of its creation and cannot migrate to another sover-

eignty" (Bank of Augusta *v.* Earle, 13 Peters, 588), still its existence may be recognized in other States, and its residence presents no objection, *per se*, to its transacting its business in other States.

And in pursuance of the general law of comity among States composing the Union, the presumption is that a corporation, if not forbidden by its charter, may exercise the powers thereby granted, within other States, unless prohibited therefrom, either by direct enactment of their statutes or by the settled adjudications of their highest Courts.

Am. & For., Christian Union *v.* Yount, 101 U. S., 352.

There has been no direct enactment by statute that prevents the appellant exercising its corporate powers in the territory of Arizona, so far as they relate merely to the custody, control and care of children intrusted to it.

The certificate and conditions required of foreign corporations by Title 13, Chapter 9, of the territorial statutes of Arizona relate to business corporations, and are exacted as conditions of their doing business in the territory.

They were never intended to relate to charitable, benevolent or religious corporations, not engaged in business as such. The custody of children, and placing them in homes, temporarily, with a view to final adoption, certainly will not be construed to be the transaction of business.

Neither has there been a settled adjudication by the highest Court of the territory forbidding or prohibiting the appellant from the exercise of its corporate powers within the territory.

What is the highest court of a territory?

The highest court of a State is vastly different from a territorial court.

As to one, the Court of last resort in State matters is a State court; as to the other, the court

of last resort in territorial matters is the United States Supreme Court, or United States Circuit Court of Appeals.

"The people of the United States as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms."

Murphey *v.* Ramsey, 114 U. S., 15-44.
Mormon Church *v.* United States, 136 U. S., 1-44.
Shively *v.* Bowlby, 152 U. S., 1.

The Government consists of three branches, the executive, the legislative and the judicial; and the highest judicial expression that can be applicable to a territory is that given forth by the United States Supreme Court.

When it is stated that the Government of the United States has control of the territories, it doesn't mean one branch of the Government, but the Government as a whole, consisting of the executive, the legislative and the judicial departments thereof, so that the highest judicial expression of the policy of the territory must come from the United States Supreme Court, that is, that Court is as to territories their highest Court. And from that court has proceeded no adjudication that a corporation, such as the appellant, should not be permitted to exercise its power of custody, and control of the children confided to it, in any of the territories of the United States. Surely if the principle of comity between the States is ever to be applied, if corporate powers conferred in one State are ever to be recognized in other parts of

the United States, that principle should be applied and that recognition given, to purely benevolent, charitable and religious corporations, so long as those powers do not conflict with the policy of other States and parts of the Union, as declared by their laws or the adjudications of their courts. And certainly there is nothing in the powers conferred upon this appellant that is in conflict with the policy of any Christian civilized community.

If that principle of comity is to be recognized as to the Statute which created this appellant, and recognition given to it, and to the corporation created by it, then the appellant, as a corporation purely, and not as the agent of the State of New York performing a duty incumbent upon that State, was and is legally entitled to the custody of the children confided to it.

The State of New York, where they were born and have their domicile,is their *parens patriae*, with right, as we have seen, superior even to their natural parents, has intrusted them to the appellant, and the spirit of comity requires that that act of the State of New York should be given full force and effect.

V.

As a mere matter of legal discretion, upon the facts found, the Court should have restored these children to the custody of the appellant.

The formal conclusions of fact found by the Court are rather highly colored, and they must be supplemented by the statement of facts made by the learned justice writing the opinion, and in which all the members of the Court concurred.

It is clear upon the facts that the appellant never parted with the custody and control of these children until they were taken from it by threats and violence.

It is perfectly apparent that the disposition of these children amongst the half-breed Mexican Indians was not intended to be a final disposition of them. The learned justice in his statement of facts, says that:

"Upon the arrival of the train the priest came into the car, and Sister Anna Michella then asked him what sort of people they were to whom the children were to be allotted. He thereupon said that they were all good American citizens, moral, and had no children of their own, and that the homes were all that could be wished for. Having noticed that some of the people were not as fair in color as she had hoped for and expected, the sister asked him if there would be any half-breeds among them, and he said, 'No.' She asked him how the people lived, and he replied that they lived in frame houses. She then stated to him that it was the rule of the home that the children were only placed out on trial until such time as the homes could be visited by the sisters, and that if it were found that any of the homes were not as expected the children would be removed" (folios 94-95).

She then added "The father told us 'That will be all right'; we could be fully assured we were to have perfect freedom of act in that way" (folio 133, from the evidence).

Again he says that after the distribution of the children, which caused so much indigation, citizens to the number of two or three hundred, assembled to meet the agent Swayne and the priest. "At this meeting much excitement was manifested, but no act of violence was done at that or any other time; some threats, however, of a general

character were made by certain persons against the agent Swayne. Both Swayne and the priest made a statement of their position at this meeting. Swayne at that time was apprehensive that he might receive bodily harm. In his statement at the meeting he said that the children were placed temporarily in charge of the people to whom they had been consigned, but the understanding was that sisters were to remain for a matter of two or three weeks, and if it were found by them that any of the children were placed in improper homes they would be taken from such homes and replaced." (Folios 98-99.)

It thus very clearly appears that the children were not definitely disposed of to the Mexican Indians. That had not been the original intention. Their disposition was simply tentative, until it could be ascertained that the people to whom they had been consigned were worthy to have the permanent care of them.

The case shows very clearly that the children were taken from the officers of the appellant, and withheld from them by force. It is not a case of abandonment, or surrender, where the party holding the child has rightfully, or at least without wrong or violence, become possessed of the person of a child, and refuses to surrender it to the one who was originally rightfully entitled to its custody, but who had by his acts forfeited that right.

From the eleventh finding of fact by the Court, it would appear that three of the children, including the infant Norton, were voluntarily delivered by Swayne to the Deputy Sheriff, to be distributed among the American residents in Morenci, but such was not the fact. In the statement of facts made by the justice writing the opinion, he states that Swayne "protested against the taking of the children by the American residents; and neither by his consent, nor that of the sisters, were the

children either taken from the homes in which they had been placed, or given to the respondents."

The appellant thus lost control of the children confided to its custody by the State of New York, not by the consent of its officer, but through force, provoked by the blunders of those in whom the appellant had confided. And the fact that the plaintiff in error made a mistake or was guilty of an error in judgment in committing, through its temporary agents, the custody of these children to the care, upon probation, of unfit and unworthy persons, is not sufficient to deprive it of its right to the care and custody of such children.

The learned Court below, in its opinion, states: "The petitioner has frankly conceded that a great blunder was committed in the consignment and delivery of the children to these degraded half-breed Indians. The evidence satisfies us that it was an unintentional blunder on the part of the institution, and was caused by the misleading and inaccurate report of the local priest, who was not connected with the institution, and was a foreigner and unacquainted with existing conditions; that such blunder was not remedied at the time because of the tactless stubborness of the agent, and the feeling of the sister in charge that she must bow to the authority of the priest, who insisted upon such disposition. We recognize the desire of the institution to right now, and to right itself the wrong done these children, and to secure for them now suitable homes to be chosen by it; and, with the record of its great service to humanity in the past, we have no doubt of its purpose and ability to do so." (folio 108).

Under that state of facts, it would seem that no possible doubt could exist as to the duty of the Court to restore to the Hospital the custody of the child, of which it had been illegally and forcibly deprived.

Even when the child has been taken away from its parents because of their neglect, they may regain it by showing that the cause for which their child was taken from them no longer exists.

In the case of Farnham *v.* Pierce, 141 Mass., 203, it was held that a commitment under a statute of that state of a child to the custody of the Overseer of the Poor of a City by a District Court, upon a finding that the child was, by the neglect of its parents, growing up without education and salutary control, in circumstances exposing it to lead an idle, dissolute life, is valid, and the statute constitutional; but the committment is not conclusive upon the parent as an adjudication of his right to the custody of the child; and upon a petition for a writ of habeas corpus to obtain the custody of the child, the parent may show that the cause stated for the commitment no longer exists, that he is competent and fit to have the care of the child, and that the welfare of the child will permit of its removal to its parent's custody.

Here the wrong was concededly committed by one not connected with the appellant, and when the appellant desires to rectify the wrong, by taking the children back to the east, it is prevented by force from doing so, and deprived of the legal custody of the children, and the Court gives as a reason for ratifying the force used, and upholding the wrong done, that "it appears that the mis-"take as originally made, was made by one not "connected with the petitioner, and that the ulti-"mate purpose of the institution, that of finding "suitable homes for their children, has in this in-"stance, already been accomplished, we do not be-"lieve that the best interests of the children will "be promoted by allowing the petitioner to adopt "the course it desires." (Page 51, fol. 108.)

Why the fact that the mistake that was made, was made by one not connected with the appellant,

is a reason why it should not have its children restored to it, I am unable to understand.

Conceding that the Court, may, upon habeas corpus, in its discretion, disregard the strict legal rights of parties to the custody of infants, still that discretion should not be exercised unless there has been an abandonment, or surrender, of that legal right, or the legal custodians are shown to be unfit to longer have the control of such infants.

Here there was no abandonment, or surrender, by the appellant, of its legal right to the custody of these children; it expressly reserved its control over them; it expressly reserved the right to take them from the persons to whom they had been consigned, if upon trial such persons were found to be unfit.

Conceding that a mistake was made in the selection of homes; it was made by those not connected with the appellant. And the Court below has found that the appellant has frankly acknowledged its mistake, and is anxious and willing to rectify it.

It has also found that the appellant is able, willing and fit to have the custody and control of these children.

Surely these facts do not present a case warranting the Court in disregarding the legal rights of the appellant.

Assuming that the Court may exercise its discretion as to granting the prayer of the petitioner, nevertheless such discretion must be "not arbitrary and capricious, but a sound judicial discretion. It must be regulated upon grounds that will make it judicial."

Seymour *vs.* De Lancey, 3d Cow., N. Y. Rep., 505-521.

In the case at bar it is respectfully submitted that there are no grounds upon which the Court

below has exercised its discretion that will bear the test of examination. The Court finds as a matter of fact that the institution, which has a legal title to the care and custody of the child, "desires to secure for the child a suitable home, to be chosen by it, and that, with the record of its great services to humanity in the past, the Court has no doubt of its purpose and ability to do so." This is a fact. Against this, there is nothing but the guesswork of the Court that the child will be well taken care of by its present custodian. That can be at most simple guesswork. It has no basis of fact or of experience or knowledge to sustain it. Nor is there any legal or moral obligation on the part of the present custodian to continue the support of the child. What is said by the Court as to the probability that in no other home that can be found for the child is it likely to fare so well, and that it is for its best interests that it should grow up to manhood "in the changing West, the land of opportunity and hope," cannot be said to justify any judicial decision. Certainly not a decision depriving the petitioner of its undoubted legal right, and substituting for its trained and experienced judgment the guesswork of those who have had no experience whatever in the matter.

The fact that the original mistake was made by one not connected with the petitioner would seem to be a reason for rectifying that mistake by directing a restoration of the child, rather than for denying it; and the fact that the ultimate purpose of the institution—that of finding suitable homes for their children—has in this instance already been accomplished, leaves entirely out of view the fact that such home is not one selected or approved by the institution. The State of New York devolved upon the Hospital the power and duty of selecting a home for the wards of the State; and to hold that such power has been forfeited because

by a mere accident a stranger has obtained possession of the child, without the consent or knowledge of the State of New York or its representative, is, it is respectfully submitted, a disregard of the duty of the Court of Arizona. The bringing of this proceeding by the Hospital is of itself conclusive evidence that it is not satisfied with the present home of the infant. But the Court in effect has said, "True, the respondent obtained and retained possession of the child without your knowledge or consent, but inasmuch as he has expended much money and much time in resisting your efforts to enforce your rights to the custody of the child, and has shown great affection for the child; and, inasmuch as the West is a great and prosperous country, your application is denied." There is no sound judicial discretion in such a judgment; it is simply capricious and arbitrary.

The right of the Hospital to visit the homes and retain a supervision over the child (Finding 2) is lost by the action of the Court.

This is of the greatest importance to the child and to its parent and to the State of New York.

VI.

The fact that the respondent has been appointed guardian of the infant Norton, gives him no legal right to its custody, and presents no legal obstacle to its being restored to the appellant.

Even when a guardian has been legally and properly appointed, and the appointment remains in full force, such appointment does not operate

as a bar to prevent the Court, on habeas corpus, awarding the custody of the infant to some other person.

In the case of Woodworth *v.* Spring, 4 Allen, 321, cited in the court below, a guardian had been appointed in the State of Illinois, where the child was legally domiciled. One had also been appointed in the State of Massachusetts, where the child was at the time of the controversy. And in reference to this latter appointment, the Court said: "Nor can we see that the appointment of a guardian over the minor by the Probate Court in such Commonwealth operates to bar any decree by this Court in favor of the foreign guardian, awarding to him the custody of his ward. * * * The decree of the Probate Court does not deprive this Court of the power to adjudicate and determine the question of the proper custody of the child as between the domestic guardian, and one appointed in the place of the domicile of the infant. The jurisdiction of this court to decide, on habeas corpus or other proper process, concerning the care and custody of infants, is paramount, and it cannot be taken away by any decree of an inferior tribunal."

In the case now before us, at the time of the proceedings before the territorial court, the respondent was not a legal guardian even in the territory. An appeal had been taken from the order appointing him guardian (page 29), and the statute in that territory, which provides for appeals from decisions or decrees of the Probate Court to the District Court, also provides that "all causes removed by appeal to the District Court shall be tried anew, as if originally brought in such court." (Title 17, Chap. 13, Sec. 1952, Revised Statutes of Arizona.) And the Court below has held, and I think properly held, that "such appeal vacates the order of appointment and the

letters issued thereunder." (Page 51, Fol. 107.)

The respondent, then, had not even a colorable right to the possession of the child. And we are thus presented with the spectacle of a child taken from its legal custodian and guardian, its legal parents, so to speak, who is found by the Court to be a proper guardian and custodian of the child, imbued with a proper purpose to care for it, and with perfect ability to do so, and turned over to a stranger, to one utterly without any legal right to its custody and control.

It is respectfully submitted that the order appealed from should be reversed, and an order entered awarding the custody of the infant, William Norton, to this appellant.

D. Cady Herrick,
Charles E. Miller,
William C. Trull,
Of Counsel for Appellant.